Supreme Court, U.S.
FILED

95-265 JUL 5 1995

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CLEVELAND INDUSTRIAL SQUARE, INC.,
Petitioner,

vs.

MICHAEL R. WHITE, Mayor of the City of Cleveland; DANNY R. WILLIAMS, Chief Law Director for the City of Cleveland; KENNETH G. SILLIMAN, Chief Assistant Law Director for the City of Cleveland; RONALD JONES, Commissioner, Division of Environment of the City of Cleveland; and WILLIAM ONDREY GRUBER, Assistant Law Director for the City of Cleveland.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT WHEN THE COMPLAINT COMPLIED WITH THE MANDATES OF CIVIL RULE 8 A.

Standard of Review: Abuse of Discretion

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT WHEN THE COMPLAINT WAS SUFFICIENTLY PLED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

Standard of Review: Abuse of Discretion

TABLE OF CONTENTS

	PAGE
Questions Presented for Review.	i
Table of Contents	ii
Table of Authorities.	iii
Jurisdiction	v
Constitutional Provisions Involved.	vi
Statement of the Case	1
Argument	
I. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT PURSUANT TO RULE 12(B)(6)WHEN THE COMPLAINT COMPLIED WITH THE MANDATES OF CIVIL RULE 8 A	6
II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT WHEN THE COMPLAINT WAS SUFFICIENTLY PLED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.	14
Conclusion	21
Appendix A U.S. District Court Order, January 14, 1994	
Appendix B U.S. Court of Appeals Order, April 6, 1995	

TABLE OF AUTHORITIES

Azar v. Conley, 456 F.2d 1382 (1972) . 16

Baker v. Lutheran Sparrowbush Associates, 808 F.Supp 972 (S.D.N.Y. 1992) . . 8, 11

Conley v. Gibson, 355 U.S. 41 (1957) 6,7,17

Evans v. McDonald's Corp., 936 F. 2d 1087 (1991) 8

Fontana v. Barnham, 707 F.2d 221 (1983) 15

Harris v. U.S., 204 F.Supp. 228, aff'd, 308 F.2d 573 (D.C. Mass, 1962) . . . 13

L'Orange v. Medical Protective Co., 394 F.2d 57, 59 (6th Cir. 1968) 17

Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) 17, 18

Mercado v. Kingsley Area School, 727 F.Supp 335 . . . . . 11, 12

Newman v. Silver, 713 F.2d 14 (1983) . 8

Parratt v. Taylor, 451 U.S. 527 (1981) 15

Scher v. Board of Education of West Orange, 424 F.2d 741, 744 (3rd Cir. 1970) 18

Scheuer v. Rhodes, 419 U.S. 232 (1974) 12

Walter Reade's Theatres, Inc. v. Loew's, Inc., 20 F.R.D. 579(D.C.N.Y. 1957) 7

Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976) 7

Zinerman v. Burch, 494 U.S. 113 (1990) .10

RULES AND STATUTES

Title 42 United States Code, Section 1983 . . . . . passim

Rule 12 (B)(6), Federal Rules of Civil Procedure 12, 20

Rule 8, Federal Rules of Civil Procedure 6, 7

JURISDICTION

Jurisdiction of this court is invoked under the provisions of 28 U.S.C. Section 1254(1), and Rule 20, Rules of the Supreme Court of the United States.

The District Court issued its Order Dismissing Petitioner's Complaint on January 14, 1994. A copy of that opinion is attached hereto as Appendix "A". The Court of Appeals entered its judgment and opinion on April 6, 1995. A copy of that opinion affirming the decision of the District Court is attached hereto as Appendix "B".

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein is the Fourteenth Amendment of the United States Constitution, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

On November 7, 1988, Petitioner herein, Petitioner, and the City of Cleveland (by and through its directors, agents, and employees) entered into an agreement whereby the City of Cleveland would deed a parcel of land to Petitioner, and in exchange Petitioner would construct a 92,000 square foot building within two years from the date the deed was recorded. The agreement was memorialized by a Development Contract, a Purchase Money Mortgage, an Official Deed, and a Promissory Note (collectively referred to herein as the "sale documents").

The Purchase Money Mortgage was entered into on November 17, 1988. The Mortgage provided that "if, by reason of Force Majeure, the Mortgagor is unable to perform or observe any agreement, term or

condition thereof, other than any obligation to make payments hereunder . . .the Mortgagor shall not be deemed in default during the continuance of such inability."

Petitioner applied to the City of Cleveland for the requisite building permits to begin construction on the 92,000 square foot building. After the shell permit was granted, Petitioner purchased steel and began grading the property. On April 5, 1990, however, the City denied Petitioner a use permit for the property and also denied all electrical permits. Petitioner appealed the decision to the Cleveland Board of Zoning Appeals and subsequently to the Cuyahoga County Court of Common Pleas. On February 21, 1991, the Trial Court ruled that the City's decision denying Petitioner the use permits and electrical

permits was arbitrary and unreasonable. This ruling, however, was later reversed by the Eighth District Court of Appeals on October 8, 1992. Thereafter, the head of the City's Economic Development Department informed Petitioner that the City did not want Petitioner to use the property as proposed and that the City was going to give Petitioner a notice of default.

The City, in its refusal to grant Petitioner a use permit, and subsequent issuance of a default notice (despite the fact that the City's previous conduct and the remedy thereof consumed a substantial period of time), Respondents effectively **prevented** Petitioner from constructing the building by refusing to issue the requisite permits. In so doing, Respondents created a situation of *force majeure*. Since the City refused to grant

the required permits, it placed Petitioner in the position that if it (Petitioner) proceeded with construction, it would be in violation of the City's building codes, and if it did not proceed with construction, it may be in default of the Official Deed.

On April 4, 1991, Petitioner filed a complaint in the Cuyahoga County Court of Common Pleas requesting a declaration that Petitioner was not in default and that the City was not entitled to re-enter, take possession of the property or revest the estate. Petitioner also sought a preliminary injunction against the City. Petitioner was completely unsuccessful in its pursuit of such matters throughout the underlying litigation at the state level.

On October 3, 1991, despite the fact that the City actually prohibited Petitioner, Petitioner, from performing

under the contract, applications, the City re-entered the property and took possession thereof. On July 8, 1992, the City removed two signs and structural steel from the property which belonged to Petitioner. To redress the wrongful activity of the City, Petitioner filed a complaint against Respondents in the Federal District Court pursuant to Title 42 USC Section 1983. On January 14, 1994, in the United States District Court for the Northern District of Ohio, Petitioner's Complaint was dismissed based upon Respondent's Motion to Dismiss and pursuant to Rule 12(B) (6) of the Federal Rules of Civil Procedure. As noted supra. on February 4, 1994, Petitioner filed its timely notice of Appeal to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the trial court's decision on April 6, 1995.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING Petitioner'S COMPLAINT PURSUANT TO RULE 12 (B)(6)WHEN THE COMPLAINT COMPLIED WITH THE MANDATES OF CIVIL RULE 8(A).

Under the Federal Rules of Civil Procedure, the purpose of pleading is to facilitate a proper decision upon the merits. Conley v. Gibson, 355 U.S. 41 (1957).

Rule 8(a) specifically requires:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a

> demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 8(a) requires that each averment of a pleading be simple, concise and direct to avoid verbose allegations, to notify the defendants of the claim upon which the Plaintiff seeks recovery, and to assist the disposition of the litigation on the merits. Walter Reade's Theatres, Inc. v. Loew's, Inc., (D.C.N.Y. 1957), 20 F.R.D. 579. As noted by this Honorable Court in Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976), all a complaint need do is afford the defendant "fair notice of what plaintiff's claim is and the grounds upon which it rests." citing Conley v. Gibson, 355 U.S. 41, 47 (1957). Petitioner additionally submits that Rule 8 of the Federal Rules of Procedure does

not require a plaintiff to specify the legal theory in which relief is sought. Baker v. Lutheran Sparrowbush Associates, (S.D.N.Y. 1992), 808 F.Supp 972. As noted in Evans v. McDonald's Corp., 936 F. 2d 1087 (1991), the purpose of "fact pleading" is to give a defendant fair notice of claims against it without requiring plaintiff to have every legal theory developed in detail before complaint is filed and parties have the opportunity for discovery. Federal pleading is by statement of claim, not by legal theories. Newman v. Silver, 713 F.2d 14 (1983).

In the instant matter, the trial court erroneously dismissed Petitioner's complaint. Such complaint was dismissed, not because the complaint failed to put Respondents on sufficient notice of the

complaint; or, that the pleading was so verbose it was intelligible; or, that it could not assist the disposition of the litigation. Rather, the trial court dismissed Count I of Petitioner's Complaint because it claimed that the complaint did not allege that the signs and steel were taken from Petitioner's property pursuant to a municipal policy; and then dismissed Count II of Petitioner's Complaint because it determined that the facts established that Petitioner had "received all the process it was due."

Petitioner respectfully submits that the trial court abused its discretion because not only did it dismiss Petitioner's complaint on factual merits based upon a prediction of the outcome of the matter, but the trial court also reasoned that the complaint was not

properly pled under one of the three theories of a cause of action arising under Title 42 USC Section 1983.

On page 5 of the trial court's Opinion, the trial court states that "The re are three types of actions that may be brought under Section 1983." citing Zinerman v. Burch, 494 U.S. 113 (1990). The court explained the three types of causes of action and stated that Petitioner's complaint falls under the subsection of "procedural due process" because the complaint did not allege that Respondents violated its "specific rights . . . or that the City's actions were arbitrary and capricious." (Opinion p. 6). The Trial Court does not state that the complaint fails to state a proper claim under 24 USC 1983, but rather, as noted supra., it determined that the complaint does not allege the specific

1983 *theory* under which the Complaint should fall.

To determine whether a pleading is correctly pled under Rule 8, a court must determine whether the plaintiff's complaint sets forth sufficient allegations to establish a claim for relief. Mercado v. Kingsley Area School, 727 F.Supp 335, 338. The correct issue then, is not whether Petitioner complaint stated facts sufficient to form **a cause of action**, but whether the complaint stated facts sufficient to form a **claim**. Id.

The Federal Rules do not require a plaintiff to specify to legal theory in which relief is sought. Baker v. Lutheran Sparrowbush Associates, (S.D.N.Y. 1992), 808 F.Supp. 972. The Opinion of the Trial Court, however, indicates that, at least in part, the complaint was dismissed

because the legal theory of the 1983 action was not pled with specificity. Such reasoning is contrary to established law and the trial court's decision should be reversed.

"The Court's task on a 12(b)(6) motion is a limited one. The issue is not whether a plaintiff will ultimately prevail, but whether the complaint is entitled to offer evidence to support the claims." Mercado, 727 F.Supp. 335, 338 (1989), citing, Scheuer v. Rhodes, 419 U.S. 232, 236 (1974). The trial court in the instant case went beyond its authority when it dismissed Petitioner's complaint. Relative to Count I of the Complaint, the trial court first decided under which legal theory the 1983 action should have been pled, and then dismissed the complaint. As it relates to Count II of the Complaint, the trial court improperly

considered facts outside the record and considered the merits of the case. At this juncture, the merits of the case are not before the trial court.

A trial court is not to dismiss a complaint if it reviews the claim for which relief can be granted even absent allegations of specific fact sufficient to constitute a cause of action. Harris v. U.S., (D.C. Mass, 1962), 204 F.Supp. 228, aff'd, 308 F.2d 573. Unfortunately, in the case at bar, the District Court went beyond the parties' pleadings in dismissing Petitioner's Complaint.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING Petitioner'S COMPLAINT WHEN THE COMPLAINT WAS SUFFICIENTLY PLED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

Throughout Petitioner's Complaint, Petitioner has maintained that the City of Cleveland, by and through its Mayor, Law Director, Assistant Law Directors and Commissioner took, under color of state law, a parcel of land that lawfully belonged to Petitioner, without authority or privilege to do so. Petitioner has maintained throughout that such conduct was a violation of 42 USC 1983, which states:

> Every person who, under color of statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to

> the deprivation of any rights, privileges of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress imposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 U.S.C. Section 1983.

"In order to state a cause of action under Section 1983, a plaintiff's complaint must allege a deprivation of a right 'secured by the Constitution and laws of the United States' resulting from conduct committed by a person acting under color of state law." Fontana v. Barnham, 707 F.2d 221, at 225 (1983), citing, Parratt v. Taylor, 451 U.S. 527 (1981). Petitioner herein maintains that it's complaint easily meets the requirements set forth in Fontana and Parratt. Indeed,

the subject Complaint, at paragraphs 11 through 14, alleges that the Respondents, acting under color of state law, (i.e. under its municipal authority), willfully, wantonly and/or recklessly and maliciously took two valuable eight foot by eight foot signs from Petitioner at Petitioner's property; and that under color of state law, Respondent's slandered title to Petitioner's property by filing an affidavit with the County Recorder. Petitioner further pled that all of the actions and conduct alleged were done to further the interests of the City. All of the acts alleged were done to diminish Petitioner's control of the building and property in the Lee-Seville area, the location of the theft. As noted in Azar v. Conley, 456 F.2d 1382 (1972), 1389, "It is clear that the protection of Section 1983 extends to the unauthorized abuse of

authority by public officials." In the instant case, Respondents abused their authority in refusing to issue the required permits to Petitioner, thus preventing Petitioner from beginning construction of its building and creating a situation of Force Majeure.

Petitioner respectfully submits that in its consideration of a motion to dismiss an action brought under a civil rights statute, the trial court has a duty to proceed with special care. Indeed, in evaluating any complaint, a court has the duty to view the allegations of the complaint in the light most favorable to the plaintiff, assuming the truth of the factual allegations contained therein. Conley v. Gibson, 355 U.S. 41, 45-48 (1957); L'Orange v. Medical Protective Co., 394 F.2d 57, 59 (6th Cir. 1968). Moreover, as determined in Lucarell v.

McNair, 453 F.2d 836 (6th Cir. 1972), this Honorable Court set forth an even more rigorous standard relative to the dismissal of civil rights claims and stated that an action brought under civil rights statutes "requires (us) to scrutinize such a dismissal with special care." Id. at 837. In a footnote in the Lucarell, case, this Court went on to note that:

> The Third Circuit noted recently: A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Scher v. Board of Education of West Orange, 424 F.2d 741, 744 (3rd Cir. 1970).

Lucarell, supra., N1, at 838.

Petitioner contends that Respondents denied it of its right to clean title to the property under color of state law when

it slandered title to the land, and when it removed steel and signs from the land. Based upon the fact that the entire transaction was effected by and through the City of Cleveland pursuant to the actions and authority of its Directors and/or Commissioners, and further based upon the fact that each and every Respondent was acting in their capacity as a city official, the actions, conduct, and transaction were **necessarily** done/performed under the authority of the City and thus under the color of State Law.

Petitioner maintains that Respondents, violated its property rights without affording Petitioner due process as required under the law. At this stage, however, the District Court's dismissal of Petitioner's complaint has denied

Petitioner the opportunity to prove this contention. Petitioner's complaint was erroneously dismissed pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure, and it is this Dismissal which Petitioner herein now moves this Honorable Court to reverse. **Petitioner prays for the opportunity to have its action adjudicated upon its merits.** Without such opportunity, Petitioner will suffer additional and irreparable harm and will be unduly prejudiced. Petitioner submits that if required by this Honorable Court, it will **amend its Complaint** but should be granted the opportunity to do so. Absent such opportunity, Petitioner submits that the ends of justice will be thwarted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully moves this Honorable Court to reverse the decision of the Court of Appeals, which decision affirmed the District Court's dismissal of Petitioner's Complaint, and/or permit Petitioner to Amend its Complaint to allow Petitioner to have its day in court and its case decided upon the merits.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND INDUSTRIAL SQUARE, INC.	)	CASE NO.1:92 CV1430
Plaintiff,	)	JUDGE JOHN M. MANOS
vs.	)	**MEMORANDUM OF OPINION**
MICHAEL R.WHITE, ET AL.,	)	
Defendants.	)	

On July 17, 1992, Cleveland Industrial Square, Inc. ("CIS"), Plaintiff, filed the above-captioned action against Michael R. White (Mayor of the City of Cleveland, Danny R. Williams (Chief Law Director for the City of Cleveland), Kenneth G. Silliman (Chief Assistant Law Director for the City of Cleveland) and Ronald Jones (Commissioner, Division of Environment for the City of Cleveland), (collectively "the City"), Defendants.[1]

APPENDIX A

Plaintiff alleges that the City deprived it of property without due process of law, in violation of 42 U.S.C. §1983 ("Section 1983"). On October 2, 1992, the City filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, its motion is granted.

I. FACTS

On November 7, 1988, the City transferred a parcel of real estate to Plaintiff. The deed required Plaintiff to build a 92,000 square foot building on the property within two years of the date the deed was recorded. It further provided that if the building was not built the City had

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[1] Defendants are sued only in their official capacities, therefore, this is an action against the City of Cleveland. See, Monell v. New York Dept. of Social Services, 436 U.S. 658, 690, 98 S. Ct. 2018 2035 (1978). Plaintiff can only recover damages from the entity itself, not from the officials. Kendall v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985).

the right to re-enter, terminate Plaintiff's interest and revest title in itself.[2] On November 29, 1988, the deed was recorded.

Plaintiff did not build the requisite building on the property within the two year period. On March 21, 1991, pursuant to the terms of the deed, the City sent Plaintiff a notice of default stating that Plaintiff

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[2] The 1988 Deed provides:

> The Grantee further covenants that as provided in the contract, it shall construct a 92,000 s/f building on the land within (2) years from the date this deed is recorded of record; and in the event that prior to the completion of the Improvements by the Grantee, its successors or assigns, as provided in the contract, the Grantee, its successors or assigns shall default in or violate its obligations with respect to the construction of the Improvements as provided in the contract, or shall abandon or substantially suspend construction work on the Improvements, and such default or violation, abandonment or suspension shall not be cured, ended or remedied within three (3) months after written demand by the Grantor to do it then the Grantor shall have the right to re-enter and take possession of the Property and to terminate and revest in the Grantor the Estate hereby convened to the Grantee, ...

had three months to cure its default.

On April 4, 1991, Plaintiff filed a Complaint in the Cuyahoga County Court of Common Pleas seeking a declaration that it was not in default and that the City was not entitled to re-enter, take possession of the property or revest the estate. It also filed a motion for a preliminary injunction enjoining the City from re-entering and taking possession of the property. On April 26, 1991, the City filed an answer and a counterclaim for a declaration that in the event Plaintiff did not construct and complete the 92,000 square foot building within three months of the notice of default, it had the right to re-enter and take possession of the parcel.

On June 25, 1991, the Court of Common Pleas held a hearing on the preliminary injunction and a trial on the merits. Subsequently, the court issued a journal

entry on June 25, 1991, September 3, 1991, and April 24, 1992. All three read: "[p]laintiff's motion for preliminary injunction overruled. (Final.)"[3]

On October 3, 1991, the City re-entered the property because Plaintiff had not appealed the September 3, 1991 judgment entry. In March, 1992, Defendant Kenneth Silliman (Chief Assistant Law Director for the City of Cleveland) advised the Director

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[3] The April 24, 1992 entry also had a checkmark in the box next to the phrase "DIS. W/PREJ." CIS appealed, and the Eighth District Court of Appeals stated that it was unclear from the journal entry what was dismissed with prejudice. The appellate court stated that this entry could mean that the City's Civ. R. 41(B)(2) Motion challenging CIS's Preliminary Injunction Motion was dismissed with prejudice, or that Plaintiff's Complaint was dismissed with prejudice. The Court of Appeals recognized that the trial judge had ruled from the bench stating, "I'm going to deny your motion for preliminary judgment [sic], which effectively grants the City's cross-claim [sic] for declaratory judgment." However, it held that a trial court can only speak through its journal entries and that the three entries were unspecific and did not adequately inform the parties of the judgment of the court. Furthermore, it stated that the trial court's failure to properly indicate the disposition of the City's counterclaim deprived the appellate court of jurisdiction. Therefore, it dismissed the appeal.

of Economic Development for the City of Cleveland that the property could be shown to interested purchasers. On April 2, 1992, the City received an offer to purchase the property.

On April 30, 1992, the City filed an Affidavit with the Cuyahoga County Recorders Office, pursuant to Ohio Revised Code §5301.252(B)(3), declaring that it had re-entered and taken possession of the property.[4] On July 8, 1992, it removed from

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[4] Ohio Revised Code §5301.252 provides in pertinent part:

> (A) An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy thereof, shall be evidence of the facts therein stated, in so far as such facts affect title to real estate.
>
> (b) The affidavits provided for under this section may relate to the following matters:

the property two signs and structural steel, which belonged to Plaintiff.

Count I of the Complaint alleges that the City willfully, wantonly and/or recklessly converted Plaintiff's property by removing the signs and structural steel. Count II alleges that it willfully, wantonly and/or recklessly slandered Plaintiff's title to the real estate by filing the Affidavit in the Cuyahoga County Recorders Office. Both Counts allege that the City's intentional acts "deprived the Plaintiff of its constitutional rights to due process of law," in violation of 42 U.S.C. §1983.

II. ANALYSIS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a Complaint fails to state a claim upon which relief can be

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(3) The happening of any condition or event that may create or terminate an estate or interest;...

granted if "if appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6, 78 S.Ct. 99, 102 (1957). The Complaint is to be construed in the light most favorable to the Plaintiff and all factual allegations are to be considered as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 (1974). Furthermore, in ruling on a motion to dismiss, "a court may take judicial notice of the law of a state and records of state court proceedings." Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736 (6th Cir. 1980).

There are three types of actions that may be brought under Section 1983. Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990). The first is an action brought for a state official's violation of the specific rights defined in the Bill of Rights. Id.

at 125, 110 S.Ct. at 983. The second type is an action under the substantive component of the Due Process Clause that bars arbitrary, wrongful government actions. Id., citing, Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 664 (1986). The third type of claim is an action under the Due Process Clause's guarantee of fair procedure, a procedural due process claim. Id. at 125, 110 S.Ct. at 983.

Plaintiff alleges that the City intentionally converted its signs and structural steel and slandered its title to the real property, and that these acts deprived Plaintiff of its property without due process of law. Plaintiff does not allege that any of its specific rights guaranteed by the Bill of Rights were violated or that the City's actions were arbitrary and capricious. Therefore, it alleges a violation of its right to

procedural due process. See, Zinermon at 126, 110 S.Ct. at 983-84.

"In procedureal due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Id. at 125, 110 S.Ct. at 983 (emphasis original). In Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976), the Supreme Court established a three-prong balancing test to determine what procedural process the constitution requires in a particular case. The Matthews test weighs the value of the property interest affected by official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value or cost of additional or substitute procedureal

safeguards. Id. at 335, 96 S.Ct. at 903.

The City argues that Plaintiff's Complaint should be dismissed under the rule established in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) and Hudson v. Plamer, 468 U.S. 517, 104 S.Ct. 3194 (1984). In Parratt[5] and Hudson[6] the Supreme Court enunciated a special application of the Matthews test. Zinermon v. Burch, 494 U.S. 113, 128, 110 S.Ct. 975, 985 (1990). The Supreme Court held that where a deprivation is the result of a random and unauthorized act by a state employee, whether the act is negligent or intentional, the requirements of due process are satisfied by postdeprivation tort remedies under state

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[5] In Parratt, a prisoner sued under Section 1983 because hobby materials he had ordred were negligently lost by a prison employee.

[6] In Hudson, a prisoner sued under Section 1983 alleging that during a search of his cell a guard deliberately and maliciously destroyed his property.

law. Parratt, 451 U.S. at 541, 543-44, 101 S.Ct. at 1916-17; Hudson, 468 U.S. at 5333, 104 S.Ct. at 3203.

The City's reliance on Parratt and Hudson is misplaced. A municipality is liable under Section 1983 only if "action pursuant to official municipal policy of some nature [has] caused a constitutional tort." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2038 (1978). A municipality cannot be held liable under Section 1983 on a respondeat superior theory. Id. However, in Parratt and Hudson the Court emphasized that its holding applied only to random and unauthorized acts of state employees, not acts pursuant to established state policy. See, Zinermon, 494 U.S. at 129, 110 S.Ct. at 985. Because a municipality can only be liable for officially sanctioned acts, "its liability can never be premised on the

result of a random and unauthorized act. . . . [and] [t]herefore, a Complaint asserting liability under Monell by definition states a claim to which Parratt is inapposite." Wilson v. Civil Town of Clayton, Ind., 839 F.2d 375, 380 (7th Cir. 1988).

Under Monell, the viability of Plaintiff's Complaint depends on whether the alleged intentional acts of the City can be attributed to an official municipal policy. Official municipal policy generally refers to fixed rules and plans of action to be followed in certain situations. Pembaur v. Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986). However, official municipal policy also exists if a particular course of action is directed by the official or officials with final policy-making authority for the municipality. Id.

Plaintiff's Complaint does not allege that the signs and steel were converted as

a result of an official municipal policy. It does not allege that they were taken pursuant to any fixed rule or plan of action, or allege facts which establish that City officials with final policy-making authority directed that they be taken. Therefore, Count I of the Complaint is dismissed.

Plaintiff's Complaint alleges that the property was re-entered and the Affidavit was filed at the direction of City officials with final policy-making authority. However, Plaintiff does not allege any operative facts to establish that the City's actions deprived it of its property without procedural due process. Plaintiff alleges that: 1.) it was notified by the City of its default under the deed and the City's intent to exercise its rights to re-enter and take possession of the property; 2.) upon such notice, it filed an action in the

Cuyahoga County Court of Common Pleas, seeking a declaration that it was not in default and that the City was not entitled to re-enter and take possession of the property, and a preliminary injunction enjoining the City from exercising its rights; 3.) it received a hearing on its motion for preliminary injunction and a trial on its Complaint for declaratory judgment; and 4.) the City did not re-enter, revest title to the property and file the affidavit in the Cuyahoga County Recorders Office until after the trial court ruled in its favor. These facts establish that Plaintiff received a predeprivation hearing before the City acted. Therefore, it received all the process it was due, and Count II of its Complaint is dismissed.

III. CONCLUSION

For the foregoing reasons, the City's

motion to dismiss is granted.

IT IS SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND INDUSTRIAL SQUARE, INC.	)	CASE NO.1:92 CV 1430
Plaintiff,	)	JUDGE JOHN M. MANOS
vs.	)	**ORDER**
MICHAEL R.WHITE, ET AL.,	)	
Defendants.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the City's motion to dismiss is granted.

IT IS SO ORDERED.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX B

No. 94-3154

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CLEVELAND INDUSTRIAL SQUARE, INC.,	)	
Plaintiff-Appellant,	)	
VS.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
MICHAEL R. WHITE, Mayor of the City of Cleveland; DANNY R. WILLIAMS, Chief Law Director for the City of Cleveland; KENNETH G. SILLIMAN, Chief Assistant Law Director for the City of Cleveland; RONALD JONES, Commissioner, Division of Environment for the City of Cleveland; and WILLIAM ONDREY GRUBER, Assistant Law Director for the City of Cleveland,	)	
Defendants-Appellees.	)	

BEFORE: MILBURN and NELSON, Circuit Judges, and JOINER,******* District Judge.

*******Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by

MILBURN, Circuit Judge. Plaintiff Cleveland Industrial Square, Inc. appeals the district court's dismissal of its complaint alleging conversion and slander of title actionable under 42 U.S.C. § 1983 as a deprivation of property without due process of law. On appeal, the issue is whether the district court erred in granting defendants' motion to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6). For the reasons that follow, we affirm.

I.

A.

This action is part of an ongoing dispute between plaintiff Cleveland Industrial Square, Inc. and the City of

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designation.

Cleveland ("City"), Ohio, regarding a tract of land located at 16007 Seville Road in the City's Outerbelt Industrial Park. In 1988, the City agreed to sell plaintiff a six-acre tract of land, and on November 7, 1988, the City entered into a deed development contract, purchase money mortgage, and security agreement with plaintiff. The deed, which was recorded in the Cuyahoga County Recorder's Office on November 29, 1988, required plaintiff to construct a 92,000 square foot building on the property within two years of the date the deed was recorded. The deed further provided that in the event such a building was not constructed, the City would have the right to reenter the property and take possession, terminate plaintiff's ownership interest in the property, and vest title in its own

name.

On March 6, 1990, plaintiff submitted an application to the City for a shell building permit. Such a permit grants an applicant permission to commence construction of a building without specifying its proposed use.[8] The City approved plaintiff's request. On April 3, 1990, plaintiff applied for a use permit under the City's zoning code. However, the City denied the use permit because the intended use of the building as a trash-to-energy plant was not permitted in the area in which the property is located. The City also denied plaintiff's application for

---

[8]A shell permit does not require zoning review or approval because no use for the proposed building is included in the application. However, no new structure can be occupied without proper zoning approval expressed in a use permit.

electrical permits. Plaintiff chose not to proceed with construction of the shell building, and the property remained undeveloped.[9]

In compliance with the deed, the City issued plaintiff a notice of default on March 11, 1991. A second notice was issued on March 21, 1991. These notices informed plaintiff that, according to the terms of the deed, it had three months to cure its default or forfeit ownership and possession of the property. Plaintiff failed to cure the default, and the City reentered the

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[9]The information in this portion of Part I.A. is included in the interest of a full understanding of the facts. However, because this information is not included in the complaint, we will not consider it in reviewing the district court's grant of defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(6).

property on October 3, 1991, to reassert its possessory rights. On April 30, 1992, pursuant to Ohio Rev. Code Ann. § 5301.252(B)(3),[10] defendant Kenneth G. Silliman, the City's chief

assistant law director, filed an affidavit in the Cuyahoga County Recorder's office purporting to transfer title to the property

---

[10]Ohio Rev. Code Ann. §5301.252 provides in relevant part:
(A) An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state . . . may be recorded . . . When so recorded, such affidavit . . . shall be evidence of the facts therein stated, insofar as such facts affect title to real estate.
B) The affidavits provided for under this section may relate to the following matters:

. . .

(3) The happening of any condition or event that may create or terminate an estate or interest . . . .

to the City by stating that the City had reentered the property and had taken possession after plaintiff's default.

B.

Plaintiff filed this action on July 17, 1992. The complaint sets forth two claims for relief: a claim in conversion and a claim for slander of title. Plaintiff argues that these claims are actionable under 42 U.S.C. § 1983 because defendants' intentional acts "deprived the Plaintiff of its constitutional rights to due process of law." J.A. 53. Plaintiff's conversion claim alleges that on July 8, 1992, defendants removed from the Seville Road property two signs, measuring eight feet by eight feet, and some structural steel, all of which belonged to plaintiff, and thereby converted plaintiff's property. The slander

of title claim concerns the affidavit purporting to transfer title filed by defendant Silliman in the Cuyahoga County Recorder's office.

Defendants filed a joint answer to plaintiff's complaint on August 31, 1992. In the answer, defendants raised for the first time the defense that plaintiff's complaint failed

to state a claim on which relief could be granted. On October 2, 1992, defendants filed a motion to dismiss plaintiff complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim on which relief could be granted. The district court granted defendants' motion to dismiss on January 14, 1994. This timely appeal followed.

II.

Plaintiff argues that the district court abused its discretion by granting defendants' motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Specifically, plaintiff asserts that the complaint complied with Fed. R. Civ. P. 8(a), which sets forth the requirements for a proper complaint, and likewise, that the complaint was sufficiently pled to establish a claim under 42 U.S.C. § 1983. Defendants argue that plaintiff's complaint failed to allege the absence of adequate state remedies to redress the harm purportedly suffered by plaintiff and thus amounted to an inadequate pleading properly subject to dismissal.

Whether the district court properly dismissed plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) is a

question of law subject to de novo review. Dugan v. Brooks, 818 F.2d 513, 516 (6th Cir. 1987). "'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Cameron v. Seitz, 38 F.3d 264, 270 (6th Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In considering a motion under Fed. R. Civ. P. 12(b)(6), it is not the function of the court to weigh evidence or evaluate the credibility of witnesses, Cameron, 38 F.3d at 270; instead, the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set

of facts in support of his claims that would entitle him to relief." In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A district court may not grant dismissal under Fed. R. Civ. P. 12(b)(6) merely because it does not believe the factual allegations of the complaint. DeLorean, 991 F.2d at 1240. Moreover, a court is required to examine the dismissal of a civil rights complaint with special care. Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976).

Plaintiff argues that the district court should not have dismissed the complaint because it complied with Fed. R. Civ. P. 8(a), which requires:

> (1) a short and plaint statement of the grounds upon which the court's jurisdiction depends, unless the court already has

> jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a). Furthermore, plaintiff argues that the district court went beyond these requirements when it dismissed the first count of the complaint on the basis that plaintiff failed to allege that the steel and signs were removed from the property in accordance with a municipal policy, and when it dismissed the second count of the complaint on the basis that the facts contained in the complaint established that plaintiff had "received all the process it was due." J.A. 57. Finally, plaintiff also argues that the district court improperly determined that plaintiff had failed to plead sufficient facts under 42

U.S.C. §1983 after unnecessarily reaching a conclusion about the legal theory on which plaintiff was relying. We disagree.

A.

In this case, the district court found that plaintiff's § 1983 action alleged a violation of the right to procedural due process and judged the sufficiency of the pleadings on that basis. Plaintiff disputes this determination, arguing that Fed. R. Civ. P. 8(a) does not require a plaintiff to specify in his complaint the legal theory on which his claim rests and that the purpose of notice pleading is to give a defendant notice of the claims against him without requiring the plaintiff to develop his legal theories in detail before the conduct of discovery. See Evans v. McDonald's Corp., 936 F.2d 1087, 1091 (10th Cir. 1991).

However, plaintiff misconstrues the district court's findings following its review of the complaint. The district court did not dismiss plaintiff's complaint for failure to specifically state that its claims rested on procedural due process grounds. Rather, the district court merely reasoned, based on the allegations set forth in the complaint, that procedural due process was the nature of Plaintiff's injury. Moreover, it was not necessary for the district court to go beyond the allegations of the complaint to reach its conclusion.

Plaintiff did not allege a violation of any of the rights explicitly guaranteed by the Constitution of the United States, nor did it allege any arbitrary action by government officials that might constitute a violation of plaintiff's

substantive due process rights. Because plaintiff's complaint referred to "no other right, privilege, or immunity secured by the Constitution or federal laws other than the due process clause of the Fourteenth Amendment simpliciter," Parratt v. Taylor, 451 U.S. 527, 536 (1981), overruled to exclude simple negligence as a basis for due process claims, 474 U.S. 327 (1986), the only remaining basis for plaintiff's claim was a denial of the right to fair procedure "without due process of law." Zinermon v. Burch, 494 U.S. 113, 125 (1990). The district court did not exceed its authority by concluding that plaintiff's claim was based on procedural due process concerns; its decision was a necessary part of considering whether plaintiff's complaint was subject to dismissal. See G.M. Eng'rs

& Assocs., Inc. v. West Bloomfield Township, 922 F.2d 328 (6th Cir. 1990) (determining, under similar circumstances, that plaintiff had complained of a procedural due process violation, not a substantive due process violation, and that plaintiff's claim was subject to dismissal).

When a plaintiff asserts a claim for violation of his right to procedural due process, he must show not only a deprivation of life, liberty, or property, effected through state action, but he must also show that the deprivation lacked due process of law. Zinermon, 494 U.S. at 125. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978).

In this case, plaintiff alleges that defendants' reentry onto the Seville Road property and their filing of the affidavit constituted a deprivation of property without due process. However, plaintiff failed to allege facts demonstrating the absence of due process. As the district court noted in its memorandum of opinion issued on January 14, 1994, the facts set out in plaintiff's complaint demonstrate that plaintiff was notified of its default and of the City's intent to exercise its rights of reentry and reversion; that plaintiff subsequently filed an action in the Cuyahoga County Court of Common Pleas seeking declaratory and injunctive relief; that plaintiff received a hearing on its claims; and that the City did not reenter the property or exercise its ownership

rights until a decision had been rendered on the matter. Plaintiff had advance warning of defendants' plan to exercise the City's ownership rights by virtue of both the provisions of the deed and the notices of default, and to that end, plaintiff pursued injunctive relief to prevent defendants' actions. The fact that plaintiff has, to date, failed in obtaining such relief does not invalidate its availability. Moreover, we note that plaintiff does not allege any deficiencies in the procedures used to adjudicate its claim or suggest any remedies for perceived shortcomings in the process. Thus, we conclude that plaintiff received a hearing before being deprived of its property and that plaintiff's claim regarding slander of title fails to state facts demonstrating the absence of due

process in the deprivation of plaintiff's property. See Mathews v. Eldridge, 424 U.S. 319 (1976).

Plaintiff argues that in reaching its decision on this issue, the district court examined information outside the allegations of the complaint. However, we find that the district court considered only the facts and allegations set forth in the complaint and in those exhibits incorporated into the complaint, as well as the facts contained in the records of other proceedings involving the same dispute, which any federal court is authorized to consider pursuant to a Fed. R. Civ. P. 12(b)(6) motion. Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th Cir.), cert. denied, 449 U.S. 996 (1980); Barrett v. Baylor, 457 F.2d 119, 124 n.2

(7th Cir. 1972). Furthermore, plaintiff also argues that in reaching its conclusion that plaintiff failed to demonstrate the absence of due process, the district court considered the merits of the case. WE disagree as we do not find that the district court's determination that plaintiff failed to allege any deficiency in the process it received amounted to a consideration of the merits of this litigation, which would involve a balancing of several factors.

B.

The remaining claim in plaintiff's complaint, a "conversion" claim, also alleges that defendants violated plaintiff's procedural due process rights. Because this claim does plead facts sufficient to demonstrate a deprivation of property

without due process, we must consider whether it is subject to the pleading requirements articulated by the Supreme Court in Parratt, 451 U.S. at 543, and Hudson v. Palmer, 468 U.S. 517 (1984). In Parratt, the Court considered whether an inmate stated an adequate claim for violation of his procedural due process rights when he alleged that a package containing his hobby materials had been lost as a result of prison officals' failure to follow official procedure for receipt of mail. The Court recognized that the respondent's pleading included the two essential elements in any § 1983 action, state action and the deprivation of a guaranteed right, privilege or immunity, but it nonetheless held that the complaint should have been dismissed. Parratt, 451

U.S. at 543-44. The Court found that when a petitioner alleges a violation of his right to procedural due process by virtue of random and unauthorized actions by state officials depriving him of his property, the petitioner must show that there are no adequate state remedies to address the harm alleged. Parratt, 451 U.S. at 543-44. The Court reasoned that in situations in which predeprivation due process is not feasible, because swift action is required or because the injury is caused by random and unauthorized action by a state official, postdeprivation remedies are sufficient to constitute due process; they are the only remedies the state could expected to provide. Parratt, 451 U.S. at 539; Zinermon, 494 U.S. at 128. Where such remedies are available, "'the state action

is not necessarily complete. . . .[T]he existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.'" Parratt, 451 U.S. at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978)).

Although the Parratt doctrine originally applied to negligent deprivations of property without due process of law, the Supreme Court extended the doctrine to intentional actions by state actors in Hudson v. Palmer, 468 U.S. at 533. Again, the Court determined that random, unauthorized acts by state officials do not

violate the Due Process Clause as long as a meaningful postdeprivation remedy is available because "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." Hudson, 468 U.S. at 533.[11]

In Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), this court held that the requirements of Parratt apply at the pleading stage. "[I]n section 1983 suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the

---

[11]In Daniels v. Williams, 474 U.S. 327 (1986), the Supreme Court overruled its holding in Parratt, but not the so-called Parratt doctrine," finding that acts of simple negligence by state officials cannot serve as the basis for a due process claim. Daniels 474 U.S. at 335-36.

inadequacy of state processes, including state damage remedies to redress the claimed wrong." Vicory, 721 F.2d at 1063. Moreover, we stated that the plaintiff was required to "attack the state's corrective procedure as well as the substantive wrong." Vicory, 721 F.2d at 1066.

Plaintiff's complaint clearly sets forth it claim under the heading "conversion." WE have already noted that this claim is not protected by any specific constitutional provision or federal law other than the Fourteenth Amendment Due Process Clause and that it is a procedural due process claim. Yet, plaintiff does not allege that it is unable to sue in replevin for recovery of the signs and steel allegedly taken from the Seville Road property or that it is unable to pursue a

common law conversion action for damages. Plaintiff makes no allegations of inadequate state remedies and thereby fails to attack the available "corrective procedures." Vicory, 721 F.2d at 1066. "If [Ohio] law has procedures adequate to consider the claim of damages for the asserted violation, there is no procedural due process violation." Gibbs v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993).

In Zinerman, the Supreme Court narrowed its holdings in Parratt and Hudson, stating that the Parratt doctrine bars a procedural due process claim only if 1) the deprivation was unpredictable or random; 2) predeprivation process was impossible; and 3) the state actor was not authorized to take the action that deprived the plaintiff of his property. Zinermon, 494 U.S. at 136-

39. The controlling inquiry is whether the state was in a position to provide predeprivation process. Mackey v. Dyke, 29 F.3d 1086, 1093 (6th Cir. 1994). Thus, before we can determine if plaintiff's claim is barred by the Parratt doctrine for failure to plead the inadequacy of available state remedies, we must determine that defendants' actions meet these criteria. See Hudson, 468 U.S. at 533. In its memorandum of opinion, the district court noted that plaintiff's complaint includes no allegation that the signs and the steel were taken as a result of municipal policy. Moreover, plaintiff has not alleged that the deprivation of property involved in this claim was caused by the application of established state procedures, to which the Parratt, doctrine is clearly inapplicable.

Watts v. Burkhart, 854 F.2d 839, 9843 (6th Cir. 1988); Macene v. MJW, Inc., 951 F.2d 700, 705-06 (6th Cir. 1991). Instead, plaintiff merely alleges that defendants acted in concert to remove plaintiff's personal property from the Seville Road property. Plaintiff points to no Ohio law or regulation that authorized defendants to remove plaintiff's property without warning or without returning the property to plaintiff. Assuming plaintiff's allegations are true, as we must, the state of Ohio was powerless to offer predeprivation proceedings because it could not have anticipated defendants' actions. Therefore, we conclude that the actions alleged to constitute conversion were unauthorized, random acts not taken pursuant to any established state or municipal policy and

that the conversion claim was properly dismissed for failure to plead inadequate state remedies.

"Allowing the plaintiff in this case to invoke section 1983 in the absence of a showing that state remedies are deficient would 'make of the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Vicory, 721 F.2d at 1064 (quoting Parratt, 451 U.S. at 544). Accordingly, we conclude that plaintiff's complaint failed to state a set of facts sufficient to constitute a claim actionable under 42 U.S.C. § 1983 and that the district court properly granted defendants' motion to dismiss the complaint

pursuant to Fed. R. Civ. P. 12(b)(6).[12]

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[12]The district court found that because defendants were sued only in their official capacities, this action amounted to an action against the City and that plaintiff's complaint failed to state that the acts complained of in the conversion claim were undertaken pursuant to an official custom or policy, a prerequisite to a successful claim against the City. Although we find that defendants were sued in both their individual and official capacities, we nonetheless affirm the district court's dismissal of plaintiff's complaint. We agree with the district court that plaintiff did not allege that defendants' actions were taken pursuant to a custom or policy of the City. However, even if we assume that the single instance of conversion about which plaintiff complains amounted to a custom or policy, See Pembaur v. City of Cincinnati, 476 U.S. 469, 480 (1986), plaintiff has failed to allege that the decision to undertake the actions was made by a person with final authority under state law to establish municipal policy with respect to the intentional conversion of plaintiff's property. City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988); Pembaur, 475 U.S. at 481-85. Neither the mayor, nor any of the other city officials named as defendants, have the discretion to establish a municipal policy authorizing intentional conversion of the property of others. See also Garner v.

III.

For the reasons stated, the judgment of the district court is AFFIRMED.

Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993) (requiring plaintiff to identify the municipal policy causing his injury and connect the policy to the city itself).

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CLEVELAND INDUSTRIAL SQUARE, INC.,
Petitioner,

vs.

MICHAEL R. WHITE, Mayor of the City of Cleveland; DANNY R. WILLIAMS, Chief Law Director for the City of Cleveland; KENNETH G. SILLIMAN, Chief Assistant Law Director for the City of Cleveland; RONALD JONES, Commissioner, Division of Environment of the City of Cleveland; and WILLIAM ONDREY GRUBER, Assistant Law Director for the City of Cleveland.
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

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Counsel of Record for Petitioner
55 Public Square, Suite 1331
Cleveland, Ohio 44113
(216) 781-0734

RICHARD G. LILLIE, a member of the bar of this Court, certifies that pursuant to Rule 33, he served the within Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit, on counsel for Respondent by enclosing copies thereof in an envelope, postage prepaid, addressed to:

The Law Director for the City of Cleveland
City Hall, 601 Lakeside Avenue
Cleveland, Ohio 44113

and depositing same in the United States Mail at Cleveland, Ohio on the 14 day of August 1995 and further certified that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
OCT 25 1995
CLERK

(2)

No. 95-265

In The

Supreme Court of the United States

October Term, 1995

CLEVELAND INDUSTRIAL SQUARE, INC.,

Petitioner,

vs.

MICHAEL R. WHITE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in granting Respondents' Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, where Petitioner's two-count Complaint alleged that Respondents had, under color of law, committed the intentional torts of Conversion and Slander of Title, and deprived Petitioner of its property without due process of law, but where the Petitioner's Complaint failed to allege that state law remedies were inadequate to redress the alleged tortious conduct.

PARTIES TO THE PROCEEDING BELOW

The Petitioner herein, Cleveland Industrial Square, Inc., was the Plaintiff in the trial court. Respondents Michael R. White, Danny R. Williams, Kenneth G. Silliman, Ronald Jones, and William Ondrey Gruber were defendants in the trial court. No other person has been a party to this action. All of the respondents were employees of the City of Cleveland at the time the events sued upon were alleged to have occurred. However, the City of Cleveland itself is not and never has been a party to this action.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE CASE 1

A. Procedural History of the Case 1

B. Statement of Facts 2

i. Introduction 3

ii. The Zoning Case 5

iii. The Injunction Case 7

iv. This Case 9

ARGUMENT 10

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FILED IN THE CASE BELOW UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, BECAUSE THE COMPLAINT FAILED TO ALLEGE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, INASMUCH AS IT FAILED TO PLEAD THAT STATE REMEDIES FOR REDRESSING THE WRONG ARE INADEQUATE 10

A. Simple Compliance With Rule 8(a) of The Federal Rules of Civil Procedure Does Not Foreclose Dismissal of a § 1983 Claim Where the Claim is not Pleaded with the Specificity Required by *Parratt v. Taylor*, 451 U.S. 527 (1981) 10

TABLE OF CONTENTS – Continued

Page

B. Appellant's Complaint Below was Properly Considered and Dismissed Under Federal Civil Rule 12(b)(6)..... 16

CONCLUSION 20

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Board of Education, 880 F.2d 305 (11th Cir. 1989) 10

Bettio v. Village of Northfield, 775 F.Supp. 1545 (N.D. Ohio 1991) 15

Conley v. Gibson, 355 U.S. 41 (1957) 17

Cleveland Industrial Square, Inc. v. Cleveland Board of Zoning Appeals (1992), 83 Ohio App. 3d 301 ...6, 8

Cleveland Industrial Square, Inc. v. City of Cleveland, March 9, 1995 (unreported), Case 67068 (Ct. App. Cuyahoga) 7

Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987) 19

G.M. Engineers and Associates v. West Bloomfield Twp., 922 F.2d 328 (6th Cir. 1990) 14, 15, 16, 18

Hoeffling v. United States Steel, Great Lakes Fleet, Inc., 792 F.Supp. 1029 (E.D. Mich. 1991) 17

Hudson v. Palmer, 486 U.S. 517 (1984) 1, 12, 14, 16, 18, 19

Monell v. New York Dept. of Social Services, 436 U.S. 658 (1987) 18, 19

Parratt v. Taylor, 451 U.S. 527 (1981)..... *passim*

Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736 (6th Cir. 1980), *cert. denied*, 449 U.S. 996 (1980) 17

Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983)... *passim*

Zinermon v. Burch, 494 U.S. 113 (1990).....13, 14

UNITED STATES CONSTITUTION

Fourteenth Amendment..... 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

Federal Rules of Civil Procedure

8 10

12 ..... *passim*

42 U.S.C. Section 1983 ..... *passim*

SUMMARY OF THE ARGUMENT

Petitioner alleges that Respondents, acting under color of law, deprived Petitioner of its property without procedural due process of law, through the commission of two intentional torts: conversion and slander of title. However, Petitioner does not allege that state law remedies are inadequate to redress this alleged tortious conduct. Accordingly, Petitioner's claim is not actionable under 42 U.S.C. § 1983. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Hudson v. Palmer,* 486 U.S. 517 (1984). Therefore, the Complaint fails to state a federal claim upon which relief can be granted. *Vicory v. Walton,* 721 F.2d 1062 (6th Cir. 1983).

STATEMENT OF THE CASE

A. Procedural History of the Case

The case below was initiated when Petitioner filed its Complaint with the U.S. District Court on July 17, 1992. Petitioner's Complaint unambiguously set forth two claims for recovery. Count I of the Complaint was a claim in conversion. Count II was a claim for slander of title. Both of these claims are intentional torts under applicable state common law doctrines, which Petitioner claims are actionable under federal law pursuant to 42 U.S.C. § 1983, because its "rights to due process of law" were allegedly denied thereby.

The Respondents jointly filed an answer on August 31, 1992. That answer contained the appropriate denials

to the specific factual allegations, and a number of affirmative defenses. Relevant to the instant petition, the Respondents raised the defense that the Complaint failed to state a claim against any of the defendants (Respondents) upon which relief could be granted.

On October 2, 1992 Respondents filed a Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules, based upon the defense that the Complaint failed to state a claim against any of the defendants upon which relief could be granted.

On January 14, 1994 the District Court filed a Memorandum of Opinion and Order granting Respondents' Motion to Dismiss, and entered final judgment in favor of Respondents (See, Appendix "A" to Petition for Writ of Certiorari). On February 4, 1994 Petitioners appealed the Dismissal to the U.S. Court of Appeals, Sixth Circuit, and on April 6, 1995 the Court of Appeals filed an opinion affirming the decision of the District Court. (See, Appendix "B" to Petition for Writ of Certiorari).

B. Statement of Facts

The facts set forth in this brief are supported by the evidence of record attached to the original Complaint filed by Petitioners in the U.S. District Court, and the proceedings of other courts which are or have been subject to judicial notice in this proceeding.

i. Introduction

This case involves two very discreet claims related to a much larger dispute concerning a real estate transaction between Petitioner Cleveland Industrial Square, Inc. (hereinafter "Petitioner" or "CIS") and the City of Cleveland (hereinafter the "City"). In the early 1980's the City acquired a large tract of land in the southeastern part of the City. A six-acre portion of this land located at 16007 Seville Road was sold to CIS with the intent that CIS would develop its parcel into an industrial park. On November 17, 1988 the City entered into a development contract, purchase money mortgage and security agreement with CIS. An official deed was signed the same date, and was recorded with the Cuyahoga County Recorder on November 29, 1988. The Deed required CIS to build a 92,000 square foot building within two years of the date the deed was recorded. The Deed further provided that if the building was not built in the time specified, the City would have the right to reenter and retake possession of the property, terminate CIS's interest in the property, and revest title in the City.

On March 6, 1990, almost one and one-half years after the deed was recorded, CIS finally submitted an application to the City's Building Department for a shell permit to construct a building. The permit was approved.[1]

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[1] "Shell" permits do not require zoning approval and do not receive zoning review, because no "use" for the building is stated in the application. However, no new building can be occupied without zoning approval, which is expressed in the form of a use permit.

On April 3, 1990 CIS applied for a use permit under the City's Zoning Code. However, the use to which CIS planned to put the building was not a permitted use in that district, and the use permit was denied. Although CIS could have built the shell building and simply not put it to use, and thereby protect its rights in the property, CIS chose not to build the building. On March 11, 1991 the building was still unbuilt, and the City issued a Notice of Default to CIS, as required by terms of the Deed. A second Notice of Default was issued on March 21, 1991. The notices of default gave CIS three months in which to cure the default, as specified in the terms of the Deed. Three months elapsed and the default was not cured. Thereafter, the City re-entered the property and asserted its possessory and title interests therein. On April 30, 1992 an affidavit was filed with the Cuyahoga County Recorder by Kenneth G. Silliman, one of the Respondents, stating the facts relating to the City of Cleveland's exercise of its reversionary interest in the property, pursuant to Ohio Revised Code Section 5301.252(B)(3).

As previously stated, CIS could have simply built an empty building to protect its rights in the property. However, CIS chose to litigate on a number of fronts. This case is one of three lawsuits commenced by CIS regarding its dispute with the City. Although the other two cases involve other parties and concern legal issues which are wholly distinct from the discreet issues framed by the Complaint filed in this case, they must be explained in order to understand the larger dispute. Understanding the larger dispute is important because, despite the very narrow scope of the Complaint below, Petitioners quite

clearly seek to re-litigate the entire dispute in this proceeding, the doctrine of *res judicata* notwithstanding. A brief discussion of these cases follows:

ii. The Zoning Case

After CIS's application for a use permit was denied on April 5, 1990, CIS appealed to the Board of Zoning Appeals. After an extensive hearing, the appeal was denied by the Board of Zoning Appeals on July 16, 1990. CIS filed an administrative appeal of the decision of the Board of Zoning Appeals with the Cuyahoga County Court of Common Pleas, pursuant to section 2506.01 *et seq.* of the Ohio Revised Code. On February 21, 1991 the Court of Common Pleas reversed the Board of Zoning Appeals, and ordered the use permit to be granted.[2] The City appealed the decision of the Court of Common Pleas, and on October 8, 1992 the Ohio Court of Appeals, Eighth District, *reversed* the decision of the Common Pleas

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[2] At pages 2-3 of the Petition it is stated that "the Trial Court ruled that the City's decision denying Petitioner the use permits and electrical permits was arbitrary and unreasonable." This is false. In fact, the Common Pleas Court ruled that the *decision of the Board of Zoning Appeals* was arbitrary and unreasonable. This is important because the Board of Zoning Appeals is not a party to *this* case and, although all of the Respondents were City employees during the relevant time period, none of them were members of the Board of Zoning Appeals, and none of them were the Zoning Administrator, who made a ministerial decision to deny the use permit. This is, in turn, important because even though it was not an issue in the case below, CIS now claims the denial of the use permit is its main ground for relief in *this* case. (Petition, p. 17).

Court, and reinstated the decision of the Board of Zoning Appeals. *See, Cleveland Industrial Square, Inc. v. Cleveland Board of Zoning Appeals* (1992), 83 Ohio App.3d 301. No further appeal was taken from that decision. Therefore, as a matter of law, the use permit for which CIS applied is illegal, and the Zoning Administrator properly denied the application.

Despite the decision of the Court of Appeals vindicating the denial of the use permit, CIS continues to claim in this case that the Zoning Administrator's decision was arbitrary and that his denial of the use permit created a force majeure excusing CIS's default under the Deed. (Petition, pp. 3-4). This claim is, of course, completely untenable.[3]

While the zoning case is completely irrelevant to the discreet issues presented in this case, it does negate Petitioner's underlying claim by establishing that none of the Appellees in this case "prevented" CIS from constructing

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[3] Even if the doctrine of *res judicata* were somehow to be suspended, to prevail on such a claim the Petitioner would have to additionally prove:

1) that the Zoning Administrator had the discretion to decide *not* to apply the zoning laws,
2) that the operation of law (the Zoning Code) could amount to a force majeure in any case,
3) that CIS was unable to use the property for one of the uses permitted in that district, and was instead entitled to establish a new non-conforming use.

Of course, the doctrine of *res judicata* does apply to this claim as a result of the Zoning Case *and* as a result of the Injunction Case, which directly addressed this claim.

a 92,000 sq. ft. building on the property in accordance with the Deed.

iii. The Injunction Case

On April 15, 1991, approximately one month after the City issued notices of default to CIS pursuant to the terms of the Deed, CIS filed a Complaint for Declaratory and Injunctive Relief in the Cuyahoga County Court of Common Pleas (Case No. 208583), seeking to enjoin the City from exercising its reversionary rights under the Deed, and further seeking declaratory relief establishing that CIS was not in default of the Deed and the other conveyance documents. The City counterclaimed for declaratory relief, to establish that CIS was in fact in default of the Deed conditions. CIS also filed a Motion for Preliminary Injunction, which was merged with the Trial on the Merits, and the case was tried on June 25, 1991. As a result of the trial, CIS's request for preliminary and permanent injunctive relief was denied.[4] It is undisputed that CIS attempted and failed to obtain injunctive relief, and there has never been any order of any court preventing the City from exercising its reversionary rights under the Deed.

CIS appealed the decision of the trial court. On March 9, 1995 the Ohio Court of Appeals, Eighth District, filed an opinion and journal entry affirming the decision of the trial court in all respects. *Cleveland Industrial*

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[4] Further, it was the intent of the Trial Court that the denial of CIS's request for injunctive relief would effectively grant the City's counterclaim, establishing CIS's default.

Square, Inc. v. City of Cleveland, March 9, 1995 (unreported), Case 67068 (Ct. App. Cuyahoga). The Court of Appeals found that Petitioner was not entitled to injunctive relief (either preliminary or permanent) upon its theory that the City's denial of its use permit created a force majeure. The Court of Appeals found, as a matter of law, that 1) Petitioner was aware that zoning regulations would have to be complied with when it agreed to purchase the property, 2) Compliance with the applicable zoning ordinances was within Petitioner's control, and 3) the denial of the use permit was not a force majeure.

On August 9, 1995 the Ohio Supreme Court declined Petitioner's motion to assume jurisdiction over the case, thus finally terminating the injunction case. *Cleveland Industrial Square, Inc. v. City of Cleveland* (1995), 73 Ohio St. 3d 1425. While the issues presented in the injunction case are irrelevant to the discreet issues involved in this case, the injunction case does conclusively demonstrate that Petitioner's underlying claim, that the City "prevented" construction of its building and created a force majeure (Petition, p. 3), is groundless. The injunction case also demonstrates that, at least regarding the due process aspect of Petitioner's Slander of Title claim (Count II of the Complaint), CIS has received a trial on the merits and a decision from a tribunal which could have ordered relief (i.e., due process of law), and it received all of this *prior to* the City exercising its right to re-enter and revest title in the subject property.

iv. This Case

In Count I of the Complaint below, entitled "Conversion", CIS claims that on July 8, 1992, the Respondents removed two signs and some structural steel from the disputed property. Respondents obviously deny these allegations, but they are admitted for the purposes of analyzing whether the trial court's dismissal of the Complaint, pursuant to Federal Rule 12(b)(6), was proper.

Count II of the Complaint below was entitled "Slander of Title" and concerned the affidavit filed by one of the Respondents herein with the Cuyahoga County Recorder, reflecting the fact that the City had re-entered and retaken possession and title of the subject property. The affidavit for the most part merely sets forth the state of the injunction case as of the date of the affidavit. CIS's Complaint below does not allege that any of the statements in the affidavit are false. The Complaint merely states that CIS was deprived of its right to due process of law.

Respondents do not dispute that the affidavit was filed, or that Exhibit B to Petitioner's Complaint below is a true copy of said affidavit.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FILED IN THE CASE BELOW UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, BECAUSE THE COMPLAINT FAILED TO ALLEGE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, INASMUCH AS IT FAILED TO PLEAD THAT STATE REMEDIES FOR REDRESSING THE WRONG ARE INADEQUATE.

A. Simple Compliance With Rule 8(a) Of The Federal Rules of Civil Procedure Does Not Foreclose Dismissal Of A § 1983 Claim Where The Claim Is Not Pleaded With The Specificity Required By *Parratt v. Taylor,* 451 U.S. 527 (1981).

In Petitioner's First Argument, CIS claims that its complaint was improperly dismissed because the Complaint complied with the requirements of Rule 8(a) of the Federal Rules of Civil Procedure. However, it is beyond dispute that Civil Rights cases brought under 42 U.S.C. § 1983 must be pleaded with a level of specificity exceeding that required by Federal Civil Rule 8(a). *Arnold v. Board of Education,* 880 F.2d 305, 309-310 (11th Cir. 1989). Federal Courts have come to the conclusion that without some limitation drawing a distinction between tort law and genuine constitutional claims, virtually any tort involving a public official could rise to the level of an actionable Due Process violation. For these reasons, certain factual and/or legal matters must be specifically set forth in the pleadings to ensure that public officials are not unnecessarily distracted from their duties by the need to defend unmeritorious claims. *Id.*

This Court struggled with one of these matters in the case of *Parratt v. Taylor,* 451 U.S. 527 (1981). In that case this Court admitted that the plaintiff's complaint satisfied the three prerequisites of a valid due process claim, but nevertheless had not stated a claim for relief under 42 U.S.C. § 1983. *Id.* at 537-538. In *Parratt* this Court found that it was necessary to impose an additional requirement of specificity in order to adequately set forth a § 1983 claim; namely, that there are no adequate state law remedies available to redress the wrong alleged. *Id.* syllabus. This Court found that without this requirement:

> any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.'

Id. at 544. (citation omitted).

The failure in this case, by Petitioner, to allege the inadequacy of state law remedies is the pleading defect which renders dismissal appropriate, regardless of whether the Complaint complies with Civil Rule 8.

In *Vicory v. Walton,* 721 F.2d 1062 (6th Cir. 1983) the U.S. Court of Appeals, Sixth Circuit, unambiguously mandated that the *Parratt* requirement should be imposed at the pleading level:

> . . . we hold that in section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state

> remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong.

Id. at 1066.

In *Vicory*, the plaintiff did not allege any significant deficiency in the state's remedies, and a judgment for the plaintiff was reversed. In order to justify the dismissal of the Complaint below, it is necessary only to demonstrate that the pleading requirements of *Parratt* and *Vicory* apply, and that there is in fact an adequate remedy at state law.

Although the *Parratt* doctrine originally applied to negligent deprivations of property occurring without due process of law, this Court, in *Hudson v. Palmer*, 486 U.S. 517 (1984), extended the doctrine to unauthorized *intentional* deprivations of property by state employees. *Id.* at 533. This Court reasoned that, as in the case of negligent deprivations, the state's action in depriving someone of property without due process of law is not complete (and thus is not actionable) until and unless it provides or refuses to provide a suitable post-deprivation remedy. *Id.* The intentional torts of Conversion and Slander of Title are thus subject to the pleading requirements of *Parratt* and *Vicory* when pleaded as section 1983 claims.

Secondly, while the *Parratt* pleading requirement may not be imposed upon section 1983 plaintiffs whose claims are based upon substantive due process concerns or specific protections defined in the Bill of Rights, the policy concerns set forth in *Parratt* mandate that it must

be imposed where the plaintiff's claim is based upon *procedural due process*, i.e., where the plaintiff is allegedly deprived of property *without a fair procedure*. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). As this Court observed in *Zinermon*:

> the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide due process.

Id. at 125-126. (citations omitted) (emphasis in original).

Therefore, if the claims of CIS are *procedural* due process claims and not substantive due process claims, and if there is an adequate remedy at state law, these claims must fail. As the following discussion demonstrates, this is precisely the case.

The complaint below quite specifically sets forth the Petitioner's civil rights action into two tort claims, going so far as to entitle them "Conversion" and "Slander of Title." Under the Conversion claim it is alleged that the Respondents removed two signs and some structural steel from the disputed property and that such acts violated the plaintiff's right to due process of law. Under the Slander of Title claim it is alleged that one of the Respondents filed an affidavit with the Cuyahoga County Recorder, slandering plaintiff's putative title in the disputed property, and that this act deprived plaintiff of its right to due process of law.

There is no specific constitutional right protecting CIS from the torts of conversion or slander of title by state officers, and CIS does not allege that there is.[5] Rather, like the plaintiff in *Parratt*, CIS's complaint "refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the due process clause of the Fourteenth Amendment *simpliciter.*" *Parratt*, at 556. Further, CIS has not alleged, and there is no reason to believe, that substantive due process considerations are involved in this case. A substantive due process claim actionable without regard to *Parratt* must involve a deprivation of life, liberty or property so shocking to the court's conscience that it is actionable under the Constitution regardless of what procedural safeguards are in place. *Zinermon*, at 125; *G. M. Engineers*, at 332. The deprivations alleged in this case clearly do not fit in that category.[6] Therefore, CIS's claim can only be analyzed as

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[5] Indeed, the extent of due process protection for property rights of the type held by Petitioner was the subject of *G. M. Engineers and Associates v. West Bloomfield Twp.*, 922 F.2d 328 (6th Cir. 1990), a case presenting a situation virtually identical to this appeal. In *G. M. Engineers*, the developer entered into a development contract with a landowner, subject to a deadline by which the developer was to have performed. Failure to obtain local development approvals caused the deadline to be missed and the landowner terminated the contract. The Court found that the developer's contract rights were property for purposes of the Constitution (thus placing it on the same level as the Deed in this case), but that this property right was not specifically protected by the Constitution, other than by the Due Process Clause of the Fourteenth Amendment, *simpliciter*. The Court therefore found *Parratt*, *Hudson* and *Vicory* applicable. *Id.* at 331-332.

[6] Likewise, the U.S. Court of Appeals, in *G. M. Engineers*, found the deprivation of the Plaintiff's property in circumstances

a claim for deprivation of property without *procedural* due process. The pleading requirements of *Parratt* and *Vicory* clearly apply.

Finally, there is no dispute that Ohio law in fact does provide a tort remedy applicable and adequate to redress CIS's claims. In fact, CIS presumably set forth its claims under the headings of "Conversion" and "Slander of Title" precisely to set forth their recognition under state common law. The very fact that they are common law torts demonstrates that a state law remedy is available and the federal action is not. *Bettio v. Village of Northfield*, 775 F.Supp. 1545, 1555 (N.D. Ohio 1991). CIS has not alleged that it could not bring an appropriate action in state court for the recovery of its signs and its structural steel, or to recover damages for the supposed conversion of these items by Respondents. Taking the allegations as true for the purposes of Rule 12(b)(6), CIS presumably could maintain an action in replevin to recover the items, or an action in damages against the appropriate defendants for conversion. CIS has not claimed that these remedies are not available.

Similarly, on the slander of title claim, CIS could bring an action for damages, or an action to quiet title regarding the disputed property, or both. CIS has not alleged it could not bring these claims in state court. In addition, assuming that in either of these cases CIS had advance warning of the commission of these intentional torts, CIS could petition the state court for injunctive

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virtually identical to this case not so shocking as to set forth a claim in substantive due process. *G. M. Engineers*, at 332.

relief to prevent a potential tortfeasor from committing the tort. In fact, it is undisputed that CIS received advance warning of the City's plans to exercise its reversionary interest in the subject property, pursuant to the terms of the deed, and sought an injunction in state court to prevent the same. Although CIS failed to achieve any of the injunctive relief it requested, CIS has not alleged any defect in this remedy.

State officials obviously have no authority to commit intentional torts. In this case CIS has alleged nothing more than two unauthorized intentional torts, both random and unauthorized acts not taken pursuant to an established state procedure. Accordingly, this case falls squarely within *Hudson v. Palmer, supra,* and *G. M. Engineers and Associates v. West Bloomfield Twp.*, 922 F.2d 328 (6th Cir. 1990). The fact that CIS can and did pursue its state law remedies demonstrates that the case should be and was properly dismissed under the doctrines of *Parratt, Hudson* and *Vicory.*

B. Appellant's Complaint Below Was Properly Considered And Dismissed Under Federal Civil Rule 12(b)(6).

Petitioner's Second Argument alleges that its Complaint below was sufficiently pleaded under the Federal Rules of Civil Procedure, but does not mention which rule is specifically at issue. Since the Motion to Dismiss filed by Respondents specifically asked for consideration and dismissal under Rule 12(b)(6), Respondents assume that CIS's argument *contra* relates to Rule 12(b)(6).

Federal Civil Rule 12(b)(6) permits the trial court to consider and enter judgment pursuant to the Defendant's defense of failure to state a claim upon which relief can be granted. *Hoeffling v. United States Steel, Great Lakes Fleet, Inc.*, 792 F.Supp. 1029 (E.D. Mich. 1991). Pursuant to Civil Rule 12(b)(6), a complaint fails to state a claim upon which relief can be granted if "it appears beyond a doubt that the plaintiff can prove no set facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the allegations as pleaded are taken as true.

In this case, the crucial issue is whether Petitioner's allegations, if true, are actionable under 42 U.S.C. § 1983. As set forth in Respondents' prior argument, the actionability of CIS's claims depends upon a further allegation that state law remedies are inadequate to redress the wrongs which are taken as true for the purposes of the proceeding below.

Admittedly, it probably would have been inadequate for the court below to simply observe the lack of such allegations and dismiss the complaint. Appropriately, the trial court, pursuant to *Conley*, examined what set of facts might be proven consistent with the Complaint in order to determine whether Petitioner's claims were actionable as pleaded. CIS claims that the court below improperly went outside the pleadings to do this. However, a close reading of the District Court's Memorandum of Opinion indicates that the court referred only to evidentiary items which were attached to the Petitioner's Complaint, and to state law and the records of state court proceedings, all of which the court is permitted to do in considering a motion to dismiss. *Rodic v. Thistledown Racing Club, Inc.*,

615 F.2d 736, 738 (6th Cir. 1980), *cert. denied*, 449 U.S. 996 (1980). Indeed, had the District Court not carefully examined CIS's claims as it did, and simply dismissed the case without opinion, CIS would no doubt claim that the trial court had a duty to make such an examination of what facts might be proved by CIS.

CIS's two highly specific claims of intentional tort set forth in its Complaint clearly framed the issues for the trial court, and in response to Respondents' Motion to Dismiss under the doctrines of *Parratt, Hudson* and *Vicory,* the proceeding under Rule 12(b)(6) was reduced to the discreet issue of whether CIS's two tort claims were cognizable under state law. As set forth in the Respondents' first argument, if these claims are cognizable under state law, then due process has or could be afforded under established state procedures, thus vitiating the § 1983 claim.

The District Court found that the Conversion claim was actually made against the City of Cleveland, and that because no municipal policy was alleged, the complaint failed to state a federal claim under *Monell v. New York Dept. of Social Services,* 436 U.S. 658, 690 (1978). On the Slander of Title claim, the trial court found that Petitioner had been afforded due process through the pursuit of its injunction action in state court, and thus failed to state a claim for deprivation of procedural due process of law.

A section 1983 case may be dismissed on a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *G. M. Engineers, supra.* A reviewing court considering dismissal of a complaint under Rule 12(b)(6) is not limited to affirming or reversing on the rationale of

the district court, but may review the case *de novo. Dugan v. Brooks,* 818 F.2d 513, 516 (6th Cir. 1987). The U.S. Court of Appeals analyzed the case under *Parratt, Hudson* and *Vicory,* as against the individual Respondents, and affirmed the dismissal of the Complaint based on the failure to allege the inadequacy of state law remedies. The Court of Appeals did not analyze the case as a *Monell* claim, as did the District Court, but noted that dismissal was appropriate under the *Monell* analysis as well.

The discreet issue in this case is whether Petitioner, in its Complaint below, failed to allege the lack of a meaningful post-deprivation remedy, under state law, for the wrongs complained of in its Complaint. This much has been admitted by Petitioner. Therefore, an essential element of Petitioner's section 1983 claim is missing, and dismissal of the claim is appropriate. Accordingly, the dismissal of Petitioner's Complaint was properly affirmed by the Court of Appeals.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

U.S. Constitution, Fourteenth Amendment,
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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